What's the deal with treaties?

A lay person's guide to treaty making in British Columbia

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Introduction

The current BC treaty process began in 1990 when Canada, British Columbia and First Nations established the BC Claims Task Force to make recommendations on the scope of treaty negotiations, the organization and processes to be used, interim measures and public education. In its report the task force made 19 recommendations, which were all accepted by the three parties. (See Appendix I for the list of recommendations.)

Subsequently, First Nations, Canada and British Columbia signed an agreement in September 1992 to establish the BC Treaty Commission. The BC Treaty Commission Agreement is supported by federal and provincial legislation and by a resolution of the First Nations Summit.

In December 1993 the Treaty Commission began receiving Statements of Intent from First Nations wanting to negotiate a treaty with Canada and British Columbia.

The issues being addressed in treaty negotiations are complex and sometimes contentious. The Treaty Commission has tried, in this publication, to provide a brief but balanced summary of the issues and the debates that have surrounded these issues.

If you need more information, please see www.bctreaty.net and our guide to publications by the First Nations Summit, the federal and provincial governments and the Treaty Commission. To request a print version of the guide, email, phone, fax or write the Treaty Commission.

Cover:
Waiting for the Lieutenant Governor on the BC Packers Dock at 'Yalis (Alert Bay). 1934.
Royal British Columbia Museum, PN 1865-B

Following page:
Shuswap people drying Salmon. circa 1870s.
BC Archives, A-08313

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POLITICAL FACTORS

By 1990, there was both a political need and appetite for beginning treaty negotiations with First Nations.

Direct action by First Nations was prominent throughout the 1970s and 1980s, with sit-ins, blockades and rallies. In the 1980s these actions were aimed at asserting aboriginal title and halting specific resource development projects.

First Nations political organizations evolved and consolidated during these two decades. Various bodies became active at provincial and national levels, and tribal councils began to take root. Demands for recognition of an inherent right to self government became more forceful.

By the late 1980s, political support for the resolution of First Nations issues had grown, in part because of the activities of First Nations organizations and several court judgments favorable to First Nations' aspirations. As a result, the BC government made the decision to join First Nations and Canada in resolving long-standing issues through negotiations.

ECONOMIC FACTORS

By 1990 the economic cost of the province's refusal to participate in negotiations was beginning to tell.

Direct action and court rulings had delayed resource development projects pending the outcome of disputes over aboriginal rights and title. Economic activity was disrupted and investment in the province was down. In 1990, Price Waterhouse calculated the cost to British Columbia of not settling land claims to be $1 billion in lost investment and 1,500 jobs a year in the mining and forestry sectors alone.

LEGAL FACTORS

Since 1973 a series of landmark judgments have addressed the issues of aboriginal rights and title. The most recent was the Delgamuukw judgment by the Supreme Court of Canada in December 1997.

On the one hand, the court rulings have confirmed aboriginal rights and title and deepened our

understanding of their content — not "giving" rights to First Nations, but recognizing and protecting continuing rights.

On the other hand, major questions remain unanswered. Although the court confirmed that aboriginal title still exists in BC, it did not indicate where it exists. That will either be determined through a treaty process or decided by the courts case by case. The courts have also raised serious doubts about whether provincial laws relating to mining, forestry and other land uses can directly apply to aboriginal title lands.

Broadly speaking, the courts have over time confirmed that:

- aboriginal rights exist in law;
- they are distinct and different from the rights of other Canadians;
- they include unique property rights (aboriginal title), which are communally held rights;
- they take priority over the rights of others subject only to conservation needs;
- the legal and constitutional status of aboriginal people derives not from their race but from the fact they are the descendants of the peoples and societies that were resident in North America long before settlers arrived; and
- aboriginal rights and title cannot be extinguished by simple legislation because they are constitutionally protected. Any such legislation would have to meet strict legal tests and would be unlikely to succeed.

In the Supreme Courts' view, the challenge facing aboriginal and non-aboriginal governments is to "reconcile the pre-existence of aboriginal societies with the sovereignty of the Crown." Good-faith negotiations, with give and take on all sides, are the way the Supreme Court of Canada has suggested this be done.

The BC treaty process is a voluntary process of political negotiations among First Nations, Canada and British Columbia. It is intended as a constructive alternative to litigation and direct action.

Through political negotiations, the parties are attempting to "establish a new relationship based on mutual respect, trust, and understanding."[1] This is a key recommendation of the BC Claims Task Force Report.

HOW MANY FIRST NATIONS ARE IN THE BC TREATY PROCESS?

There are 49 First Nations currently engaged in the BC treaty process, sitting at 40 tables — representing about 65 per cent of the province's registered aboriginal population.

It is up to First Nations to decide how they will organize themselves for the purposes of treaty negotiations. The BC Treaty Commission Agreement defines a First Nation for treaty purposes as:

An aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia.

The BC treaty process is open to all First Nations in BC but not all First Nation groups have chosen to engage in treaty negotiations with Canada and BC. Some First Nations prefer instead to negotiate separately and directly with the federal and provincial governments. Other First Nations will enter the process as they become organized to do so. Still others will wait and see what can be achieved before committing themselves.

1 *See Appendix I, Recommendations of the BC Claims Task Force, number 1.*

WHAT WILL TREATIES ACCOMPLISH?

Reconciliation: Treaties are intended to reconcile the interests of First Nations, Canada and BC by establishing new relationships based on mutual trust, respect and understanding through political negotiations.

Certainty: If economic and community development is to take place, people need to know who owns a piece of land, who has the right to the resources on it and who has law-making authority over it. Treaties will provide that certainty.

Reduced conflict: Treaties aim to end conflicts over lands and resources between First Nations and others. When disputes do arise in the future, treaties will provide an agreed-upon process for resolving them.

Constitutional protection: Once concluded, the treaties and the rights defined in them are protected under section 35 of the Constitution Act, 1982. Any future changes would have to be agreed upon by the First Nation, Canada and BC.

Members of a Nlaka'pamux community, circa 1914.
Canadian Museum of Civilization, 27000

The Treaty Commission is the keeper of the BC treaty process. The Treaty Commission is not an arm of any government—it is an independent body and does not negotiate treaties. That is done by the three parties at negotiating tables: First Nations and Canada and British Columbia.

FACILITATION

The Treaty Commission's primary responsibility is to facilitate the negotiation of treaties. It is responsible for accepting First Nations into the treaty process and assessing when the parties are ready to start negotiations. It develops policies and procedures applicable to the six-stage treaty process, monitors and reports on the progress of negotiations, identifies problems, offers advice and assists the parties in resolving disputes.

PUBLIC INFORMATION

The Treaty Commission has an important role to play in providing public information and education in British Columbia through its web site, annual reports, newsletters, speaking engagements, documentaries, treaty handbooks, displays and educational resources for use in schools.

Our first objective is to raise public awareness and understanding of the historical and legal reasons for treaty making and the Treaty Commission's role in the BC treaty process. Our second objective is to provide public information on the treaty process, the Treaty Commission and the status of each negotiation.

FUNDING

The Treaty Commission allocates support funding, primarily in the form of loans, to First Nations for treaty negotiation purposes.

The task force report listed elements it considered essential to successful treaty negotiations in BC:

- the parties should be committed to the treaty process and have adequate resources to reach agreements;
- the process should be managed in BC;
- it should provide a level playing field for all parties;
- Canada, BC and First Nations should be equal partners in the management of the process; and
- the treaty process should encourage effective and efficient negotiations.

Toward these ends, the parties have generally attempted to adopt an interest-based approach to negotiations. They try to explore, understand and creatively accommodate the interests and needs that underlie each other's positions.

WHAT IS BEING NEGOTIATED?

Treaties will differ from table to table.[2] However, they are generally expected to cover three broad subject areas:

- First Nations government structures and related financial arrangements;
- jurisdiction over and ownership of lands, waters and resources; and
- cash settlements.

Treaties will also have to set out the processes for resolving disputes and making changes to the treaty.

2 *Recommendation number 2 of the BC Claims Task Force is that each of the parties should be free to introduce any issue at the negotiation table that it views as significant to the new relationship among First Nations, Canada and BC. In Stage 3 the parties negotiate a Framework Agreement, which includes an agreed-upon list of subjects to be addressed during the subsequent Agreement in Principle and Final Agreement stages.*

HOW MUCH PROGRESS HAS BEEN MADE IN THE BC TREATY PROCESS?

Considerable progress has been made in the treaty process since the Treaty Commission opened its doors in December 1993.

Of the 49 First Nations in the treaty process (see Appendix II), 42 are now in Stage 4, substantive agreement-in-principle negotiations. One First Nation, Sechelt, is in Stage 5.

FUNDING FOR NEGOTIATIONS

So that First Nations have the resources they need for an effective negotiation, Canada and BC provide a fixed amount of money to the Treaty Commission each year for allocation to First Nations in the treaty process. Eighty per cent is provided as loans and 20 per cent as contributions. Canada funds the loans and 60 per cent of the contributions; BC funds 40 per cent of the contributions.

The Treaty Commission applies guidelines established by the federal and provincial governments to determine the share of the total amount that is received by each participating First Nation.

As of March 31, 2001, the Treaty Commission had allocated $186 million to First Nations to support their negotiations. Twenty per cent of the allocation is in the form of a contribution, and the remaining 80 per cent is in the form of a loan. The mounting debt to First Nations is a concern of all of the parties.

The Treaty Commission promotes efficiencies in negotiations by encouraging First Nations to work together, either by negotiating with others at a single table, or by sharing information and collaborating in the development of approaches to treaties.

The following section highlights some of the major issues which are part of the public debate on treaty making in British Columbia.

In discussing the issues it is important to note that the legal and constitutional status of aboriginal people derives not from their race, but from the fact they are the descendants of the peoples and societies that were resident in North America long before settlers arrived.

ABORIGINAL RIGHTS AND TITLE

The Supreme Court of Canada has clarified that aboriginal rights, including property rights, are different from the rights of other Canadians. The courts did not create these rights but recognized that these rights continue to exist whether or not they are set out in a treaty. But without a treaty there is uncertainty about how and where these rights apply.

There is concern that treaties will give aboriginal people special rights and status based on race, that treaties would create inequality.

Treaty negotiations need to take place so that these rights can be defined in a way that creates certainty and ends conflict for both aboriginal and non-aboriginal people.

Aboriginal rights and treaty rights, both existing and those that may be acquired, are recognized and affirmed in section 35 of the Constitution Act, 1982.

SELF GOVERNMENT

Aboriginal self government is not a new concept. Before European settlement, First Nations governed themselves as organized societies. The subsequent imposition of the Indian Act, the creation of reserves and the adoption of assimilationist policies undermined these traditional governments and led to growing social dislocation, poverty and dependence.

First Nations have long demanded constitutional recognition of their inherent right to govern themselves according to their traditions, not European traditions.

It had been determined in 1991 that self government would be a subject for negotiation in the BC treaty process. In 1995 the federal government announced its policy to implement the inherent right to aboriginal self government, paving the way for self government negotiations to occur across Canada.

Then, in July 2000, the BC Supreme Court ruled that self government is an aboriginal right. Self government provisions will differ among treaties. This will allow First Nations communities to shed the dependency created by the Indian Act and increase their self-sufficiency. Treaties will generally aim to transfer control to First Nations over those matters that are internal and integral to their cultural survival and that are necessary to manage their lands and resources. First Nations people will still be subject to the laws of BC and Canada.

One of the challenges is to guard the interests of non-aboriginal residents on settlement lands while protecting aboriginal self government from being swamped by a non-aboriginal majority.

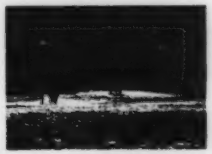
Governments have increasingly recognized the need for alternatives to existing policies governing aboriginal people. One expression of this has been the growing assumption of operational administration by tribal and band councils. Many First Nations have already begun taking over delivery of their own health, education and social services from government. With comprehensive treaties, many more agreements covering many aspects of self government will be possible.

Members of a Kootenay community, circa 1914.
BC Archives, F-08990

LAND AND RESOURCES

First Nations people view lands and natural resources as fundamental components of modern treaties. Land has spiritual, economic and political significance for First Nations peoples. Their values, their way of life and their economic viability and independence hinge on land and, in rural areas, the ability to benefit from natural resources.

Indian reserves cover 0.4 % of the British Columbia land base which represents only a small portion of the land First Nations traditionally occupied and used. First Nations people expect to increase their self-sufficiency and independence through land ownership. This will allow them to invest in and develop successful businesses, which will have spin-off benefits for all British Columbians.



People have expressed concern that private land will be on the negotiating table or that leased lands will be transferred. They are concerned about access to Crown land for recreation and about their ability to develop resources, establish businesses and own property.

Moreover, there are concerns that if there is a huge transfer of land and resources to First Nations as part of the treaties, BC's annual tax revenues and royalties will be significantly reduced.

It is important, however, to consider the land issue within the following context:

- In most cases, it will be Crown lands and resources transferred under treaties or private lands where there is a willing seller.

- Economic studies have concluded that increased control by First Nations will boost their self-sufficiency and result in joint venture and partnership business opportunities for non-aboriginal people as well.[3]

- The transfer of land and resources will enable First Nations to develop their own businesses and create taxable revenues.

3 *Benefits and Costs of Treaty Settlements in British Columbia. KPMG Report, 1996.*

FISHERIES

Fish are an important aspect of First Nations history and culture. Many First Nations communities have an interest in fishing for food, trade, employment and commercial purposes.

The courts have confirmed that fishing rights are an established aspect of aboriginal rights. In several cases the courts have ruled that aboriginal people have unextinguished rights to fish for food and that the concept of a "food fishery" should be broadly interpreted.

At the moment, there is no clear definition of the aboriginal right to fish commercially. But many First Nations believe that the Supreme Court of Canada decision in Marshall in September 1999 brought them a step closer to establishing that right. Donald Marshall, a New Brunswick Mi'kmaq, was convicted in 1996 for illegally catching and selling eels. He appealed to the Supreme Court, which overturned the conviction.

The Supreme Court ruled that aboriginal people in the Maritimes affected by a 1760 treaty with the British have access to fish and wildlife to provide a moderate livelihood for such basics as food, clothing, housing and a few amenities.

Many First Nations across Canada interpret the Marshall decision to mean that aboriginal people with a treaty fishing right can sell fish commercially.

In Marshall, the court also said that government regulation of the treaty right may be justified on a basis of conservation or economic and regional fairness, or on a history of sharing a resource between aboriginal people and non-aboriginal people.

People have expressed concerns that treaties will create unfairness in the fishery. Some argue that there is no need to give increased control or access to aboriginal people because they are already well represented in the fishing industry. They worry that there will be job losses and economic decline among non-aboriginal fishers and supporting

industries — that treaties will take away part of somebody else's livelihood.

First Nations are negotiating for a greater say in managing the resource and more access to fish. Under treaties, existing undefined aboriginal rights will be defined in a way that meets the aspirations of the First Nation while recognizing the interests of others.

FORESTRY

Like fishing, forestry is a key component of the province's economy and has a spiritual and economic significance for First Nations. And again, there are tremendous pressures on forestry as a resource and as an industry.

People have expressed concerns that transferring land ownership and resource control to First Nations will reduce timber harvesting and processing on settlement lands and eliminate non-aboriginal jobs in forestry.

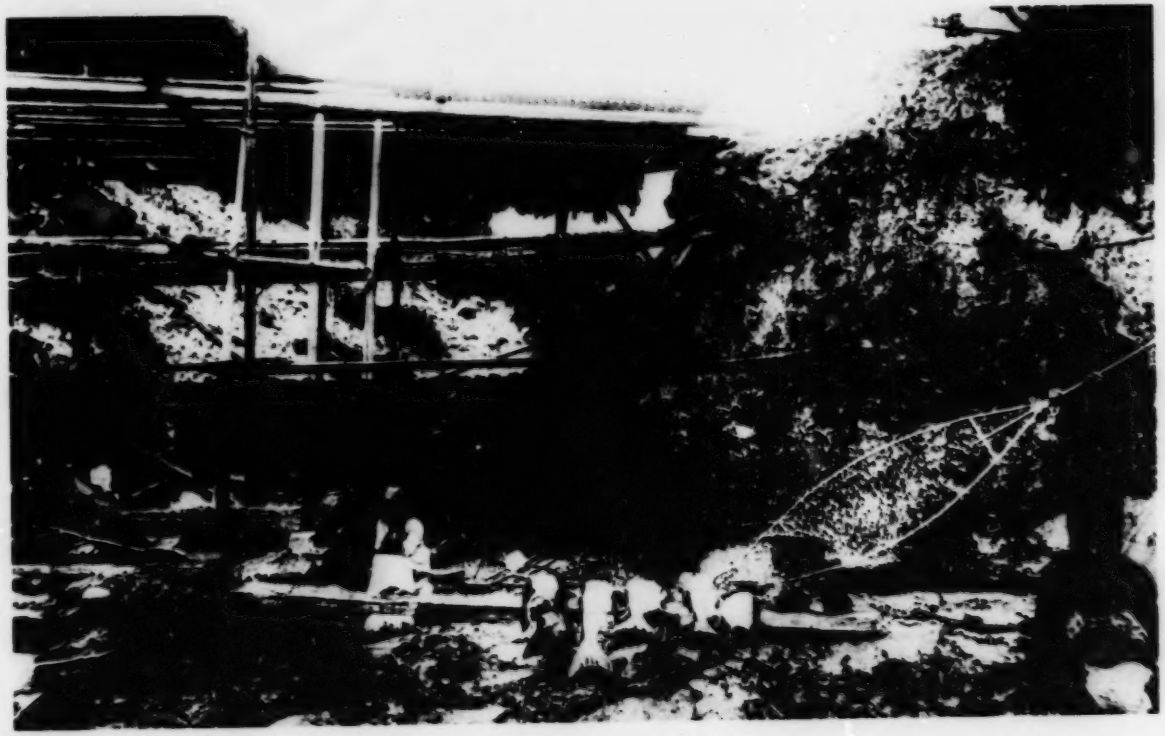
However, everyone agrees that a clear definition of forestry ownership, roles and responsibilities will benefit all British Columbians.

Studies into the impacts of aboriginal land claims settlements elsewhere have concluded that because of this increased certainty, resource development improved or stayed the same following settlements.[4]

The Nisga'a Final Agreement establishes a five-year transition period to allow forest licensees to continue to harvest forest resources on Nisga'a lands during that time.

The Nisga'a will maintain the wood-fibre supply to local mills so as not to disrupt existing forest operations. They will not establish their own primary timber-processing facility for 10 years after the effective date of the Final Agreement.

4 *ARA Consulting Group*



Siwash people curing salmon on the Fraser River, circa 1880.

Vancouver Public Library, Special Collections, VPL 3257

The Truck Loggers Association in November 1998 signed an agreement with the BC government to ensure that their members receive fair compensation for work lost as a result of the Nisga'a Final Agreement. Compensation may include other work or opportunities to work on other forest areas controlled by the Crown.

The treaty also removes the conflict on non-Nisga'a lands and allows the province to pursue forestry ventures on land previously encumbered by undefined aboriginal rights and title that precluded logging.

COSTS AND BENEFITS

People worry that as treaties are finalized:

- the province will lose substantial tax revenues and royalties;

- governments will still be funding welfare, health care, policing, justice services and education while aboriginal people will be receiving huge cash settlements; and

- because there are no cash reserves these treaties will bankrupt the governments, leaving health care and education underfunded.

Although cash settlements will be part of all treaty negotiations, the amounts will vary with the circumstances and the lands involved.

Funding for administering the treaty process and the cash settlement costs are borne jointly by the provincial and federal governments. The federal government is responsible for 72 per cent of the total cost of treaties and the provincial government 28 per cent.

The BC government's share of the overall cost is estimated at $2 billion, or $50 million annually over 40 years, plus rural Crown land with a notional value of $2.8 billion to $3.5 billion. BC's annual portion is equal to about 25 cents of every $100 in the current provincial budget.

Economic studies have evaluated the cost of treaty making and concluded that treaty settlements will create economic growth for BC.[5]

A 1996 KPMG report projected positive financial and economic outcomes from treaty settlements. It forecast a significant employment increase for British Columbia, estimated at 7,000 to 17,000 new jobs.

The study estimated that the BC economy can expect about $3 worth of total financial benefit for every $1 of provincial financial cost. The net financial benefit will be between $3.9 billion and $5.3 billion over 40 years.

A similar conclusion was reached in a March 1999 study by independent consultant Grant Thornton, which confirmed "completing treaties to settle aboriginal land claims will bring a net financial benefit of between $3.8 billion and $4.7 billion to British Columbia over the next 40 years."

The Indian Act has made economic development on reserves difficult. Because it stipulates that reserve lands cannot be seized to enforce payment of a debt, they are generally not available for use as collateral. The same is true of all real and personal property of aboriginal people or bands on a reserve. While these provisions protect reserve lands and therefore have widespread support within reserve communities, they also stand in the way of projects that require loans from banks or other outside sources.

Negotiated cash and land settlements will provide First Nations people with the capital they need to begin businesses and create jobs and industries. The money invested and new jobs created will benefit communities throughout British Columbia.

TAXATION

The Indian Act confers special tax status on aboriginal people who live and work on reserves.

Through treaties the governments of Canada and BC hope to eliminate the need for this special tax status as First Nations move toward greater economic independence. The Nisga'a Nation has agreed to eliminate its special tax status over a 12-year period.

5 *Benefits and Costs of Treaty Settlements in British Columbia. KPMG Report, 1996. Prospering Together: The Economic Impact of the Aboriginal Title Settlements in BC. Laurier Institution.*

However, First Nations in the BC treaty process are reluctant to give up their tax exemption when most other aboriginal people will continue to have it.

CONSULTATION/OPENNESS

People have expressed concern that:

- the provincial mandate within which treaties will be settled does not take into account what British Columbians want in a treaty;

- the public is not represented at the negotiating table; and

- there is little knowledge of what is being negotiated until the treaty is completed — they feel that the Nisga'a Final Agreement was made in secret and that the public found out the terms only after it was concluded.

In fact, under the BC treaty process there are numerous channels for public consultation. The federal and provincial governments use input from numerous groups to inform and refine their mandates. These include:

- the Treaty Negotiation Advisory Committee (TNAC), that provides input from key interest groups in BC. The 31 members of TNAC represent the interests of business, labor, environment, recreation, fish and wildlife groups and municipalities. Their role is to advise government negotiators.

- Regional Advisory Committees, involving representatives from key social and economic sectors in the region where negotiations are taking place, including members of the local community. The committee advises both provincial and federal negotiators about social and economic issues in the region that should be taken into consideration during the treaty negotiation. There are 13 Regional Advisory Committees throughout the province.

- Local Advisory Committees established by local residents in some communities. Five such committees exist in BC.

- Treaty Advisory Committees, comprising local government representatives, which allows officials in adjacent communities to discuss their issues, interests and concerns, advise provincial negotiators about local government issues and participate in negotiations. One representative from each committee sits as a member of each provincial negotiating team. These committees review draft chapters of the treaty and provide their comments to the negotiator for the province. There are 17 Treaty Advisory Committees in BC.

Individual tables are also responsible for mounting their own public information initiatives such as: public forums, addresses, displays, newspaper inserts and question-and-answer sessions. The parties are required to periodically advise the Treaty Commission of their joint public information program.

Most main-table negotiations are open to the public and media, and there is a full public record of those meetings. However, sometimes negotiators need closed sessions where the parties can exchange information frankly, brainstorm, explore options and look for solutions in a safe environment away from the spotlight.

TREATY APPROVAL

There has been a great deal of controversy about how treaties should be approved after negotiations are concluded.

Treaties define and set out the collective rights of First Nations. The individual holders of those collective rights must agree to the terms of the treaty if it is to have any legal effect and achieve the objective of certainty. This is why First Nations people must vote to ratify their treaty.

Many non-aboriginal people feel that they too should be allowed to vote on acceptance of the treaties.

Following page:
A pack train near Quesnel, circa 1890s.
BC Archives, A-05277

The Treaty Commission believes a public referendum is the wrong tool for ratification of treaties because:

- Canada, BC and First Nations have already agreed otherwise. The governments of both Canada and British Columbia have committed to ratification using the normal processes of parliamentary democracy: that is, to enact legislation following acceptance of an agreement by a majority of the federal parliament and provincial legislature.

- Negotiations have been conducted with the reasonable expectation that the negotiated deal will be delivered. To change the ground rules now, when agreements on ratification have already been made, would be tantamount to bad faith.

- Treaties are about rights, not voter preferences. The Supreme Court of Canada has repeatedly confirmed aboriginal rights and title. These rights cannot be denied regardless of the results of a referendum.

- Canadian democracy means more than majority rule. It also means the protection of fundamental rights by the rule of law.

- A referendum is too blunt an instrument to deliver meaningful input on an issue as complex as a treaty. A referendum is useful for questions where there is a yes or no answer, but a treaty contains so many distinct provisions that it would be impossible for governments to know which part of the treaty voters did or did not support.

- The treaty process provides many opportunities for public involvement in treaty negotiations as they proceed. These are described more fully in the "Consultation/openness" section, see page 20.

OVERLAPS

Overlaps are areas of land identified by more than one First Nation as part of their traditional territories. Overlaps result from a variety of situations, including a tradition of sharing territories for resources, movements of families or tribes and boundary disputes. If the First Nations claiming the

area acknowledge that the territory is shared by mutual consent and clearly define how they share the area, there is no conflict.

Under the BC treaty process, where there are competing interests the First Nations must resolve the overlaps before agreements in principle are finalized. Failure to do so leads to court challenges, such as that brought by the Gitanyow Hereditary Chiefs against the Nisga'a Final Agreement.

First Nations are responsible for resolving overlaps. Many First Nations have set up processes to resolve overlaps, and a number of overlap agreements have already been finalized.

CERTAINTY

Canada, BC and First Nations all want certainty of ownership of and jurisdiction over lands and resources and the authorities each will administer. Some people worry that treaties will not be final and that First Nations might make subsequent claims or look for bigger settlements because of subsequent treaties signed by other First Nations.

In the past, certainty was achieved by blanket extinguishment of First Nations' rights, title and privileges. The BC Claims Task Force rejecting that approach in its 1991 report to Canada, BC and First Nations, and warning that absolute certainty in all matters is unlikely—stated, "Section 35 of the Constitution Act, 1982 gives express recognition and affirmation to aboriginal title and treaty rights. First Nations should not be required to abandon fundamental constitutional rights simply to achieve certainty for others. Certainty can be achieved without extinguishment. The parties must strive to achieve certainty through treaties which state precisely each party's rights, duties and jurisdiction. The negotiations will inevitably alter rights and jurisdictions. Those aboriginal rights not specifically dealt with in a treaty should not be considered extinguished or impaired."

There is no such thing as absolute certainty in complex relationships. But hard work and skilled negotiations can produce reasonable certainty and predictable procedures for revision and amendment.

The Supreme Court of Canada decision in late 1997 was widely seen as a turning point for treaty negotiations. The decision confirmed that aboriginal title does exist in BC, that it's a right to the land itself — not just the right to hunt or fish — and that when dealing with Crown land the government must consult with and may have to compensate First Nations whose titles are affected. Everyone involved in treaty negotiations recognized that the court's decision could have major impacts on policies, on positions and on mandates.

The three Principals, in the wake of the Delgamuukw decision, undertook a review of the treaty process. The Treaty Commission, at the request of the Principals, identified and described certain obstacles to the completion of treaties and suggested ways of surmounting those obstacles.

The review continued through early 1999, and in an intensive round of meetings the Principals developed a series of recommendations, which are being considered and adopted where there is agreement.

The Delgamuukw decision made it clear that treaty negotiations must find a way to reconcile aboriginal title with Crown title. A statement of mutual recognition is the starting point. The Principals have agreed to the following Statement on Aboriginal and Crown Title:

1. The parties recognize that aboriginal title exists as a right protected under section 35 of the Constitution Act, 1982.

2. Where aboriginal title exists in British Columbia, it is a legal interest in land and is a burden on Crown title.

3. Aboriginal title must be understood from both the common law and aboriginal perspective.

4. As acknowledged by the Supreme Court of Canada, aboriginal people derive their aboriginal title from their historic occupation, use and possession of their tribal lands.

Previous page:
Members of an Okanagan community.
Okanagan Indian Band, Historic O'Keefe Ranch, F36-2

5 The parties agree that it is in their best interest that aboriginal and Crown interests be reconciled through honorable, respectful and good-faith negotiations.

INTERIM MEASURES AGREEMENTS

Treaty negotiations in BC will take time, and the parties must balance their conflicting interests until these negotiations are concluded. One method is the use of interim measures agreements.

Interim measures are a practical step to further the process of reconciliation. If a First Nation has a special interest in a particular parcel of land, then it makes sense to allow that First Nation to share in the benefits from that parcel while negotiations proceed to define exactly where and how title will be recognized.

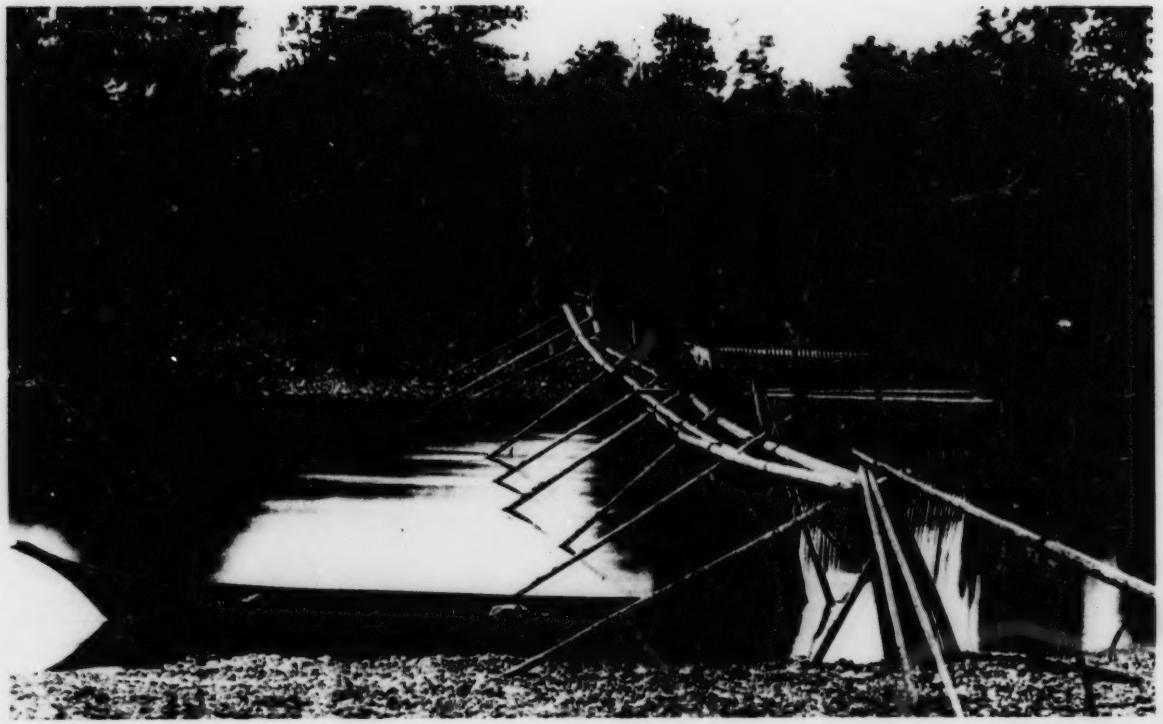
Among the solutions for improving treaty negotiations being offered by the provincial and federal governments are a type of interim measure known as treaty-related measures. They may protect Crown lands for treaty settlements, provide for land purchases from willing sellers, widen First Nation participation in land and resource management and provide for First Nation economic development.

BUILDING FIRST NATIONS' CAPACITY

Not all First Nations are ready to embark on the treaty process. Some need time to develop their treaty visions and build their capacity to negotiate or implement a treaty.

Participants in the BC treaty process, including the Treaty Commission, recognize the importance of strengthening the capacity of First Nations. It means that a First Nation can do more things for its members, can do them better and consistently and, in the process, become more self-sufficient and less reliant on outside resources.

In July 1998, the federal government committed $3 million to $5 million over five years for capacity building.



A salmon weir and dugout canoe at Quamichan Village on the Cowichan River, Vancouver Island, circa 1866.

Frederick Dally, National Archives of Canada, C-065097

1763 Royal Proclamation decrees that Indian peoples should not be disturbed in their use and enjoyment of the land. The proclamation also states that any land held by Indians is to be purchased by the Crown only — not by individuals — and that all purchases have to be agreed on by the Indian people and only after an open negotiating session.

1850s James Douglas, as Chief Factor of the Hudson's Bay Company and then as governor of the Crown colony of Vancouver Island, arranges 14 treaties to buy 358 square miles of land on Vancouver Island.

1860s Lands Commissioner Joseph Trutch prohibits the pre-emption of Crown land by aboriginal people and denies the existence of aboriginal rights or need for treaties.

1876 Canada's parliament passes the Indian Act to regulate most aspects of native life.

1880 Government begins to remove aboriginal children from their families, placing them in residential schools.

1884 Parliament outlaws the potlatch, the primary social, economic and political expression of some aboriginal cultures.

1887 Nisga'a and Tsimshian chiefs travel to Victoria to press for treaties and self-government.

1899 First Nations in northeastern BC sign on to provisions of Treaty 8, extended from Alberta.

1907 Nisga'a politicize their struggle for treaties in creating the Nisga'a Land Committee.

1913 Nisga'a send petition to Ottawa, asking that it be presented to the Privy Council in London.

1916 Formation of first province-wide aboriginal organization, Allied Tribes of British Columbia. Allied Tribes hold protest meetings.

1927 Parliament amends Indian Act to prevent land claims from going to court. Allied Tribes is declared illegal.

1949 British Columbia extends the provincial right to vote to male native Indians, two years after it adopted otherwise-universal male suffrage and dropped property requirements.

1951 Responding to international human rights criticism, parliament amends the Indian Act to remove anti-potlatch and anti-land claims provisions.

1960 Aboriginal people gain the right to vote in federal elections. The phasing-out of residential schools begins.

1973 In a landmark decision in the Calder case, the Supreme Court of Canada holds that aboriginal title did exist but is split on whether it continues to exist. The federal government establishes its "comprehensive claims policy" to address the issue of the continued existence of aboriginal title and initiates negotiations with the Nisga'a.

1982 The Constitution Act recognizes and affirms aboriginal and treaty rights, both those that exist and those that may be acquired.

1990 The Supreme Court of Canada affirms aboriginal fishing rights in its decision in Sparrow.

1991 BC Claims Task Force recommends a six-step treaty negotiation process. British Columbia recognizes the existence of aboriginal rights.

1992 Federal and provincial governments and First Nations Summit establish BC Treaty Commission.

1993 Federal and provincial governments establish the 31-member Treaty Negotiation Advisory Committee. Treaty Commission begins accepting First Nations into the treaty process.

1994 Canada recognizes the inherent right to self-government as an existing aboriginal right.

1996 The Nisga'a Tribal Council and the governments of Canada and BC sign an agreement in principle as a foundation for negotiating BC's first modern treaty. (These negotiations occur outside the BC treaty process.)

1997 The Supreme Court of Canada issues the landmark Delgamuukw decision defining aboriginal title.

1998 Nisga'a approve Final Agreement but face criticism from some of BC's non-aboriginal population and also court challenges from the BC Liberals and the BC Fisheries Survival Coalition.

1999 BC and Canada ratify the Nisga'a Final Agreement.

Sechelt Agreement in Principle is signed, marking the beginning of talks to conclude a treaty.

2000 Nisga'a treaty becomes law.

2000 BC Supreme Court rules Nisga'a treaty and enacting legislation are constitutionally valid.

2000 BC Supreme Court rules that self government is a constitutionally protected aboriginal right.

2001 Canada, BC, Cowichan Tribes and Hul'qumi'num Treaty Group endorse a historic land protection agreement setting aside 1,700 hectares of Crown land known as the Hill 60 sacred site.

RECOMMENDATIONS OF THE BC CLAIMS TASK FORCE

The Task Force recommends that:

1. The First Nations, Canada, and British Columbia establish a new relationship based on mutual trust, respect and understanding — through political negotiations.

2. Each of the parties be at liberty to introduce any issue at the negotiation table that it views as significant to the new relationship.

3. A British Columbia Treaty Commission be established by agreement among the First Nations, Canada and British Columbia to facilitate the process of negotiations.

4. The commission consists of a full-time chairperson and four commissioners — of whom two are appointed by the First Nations and one each by the federal and provincial governments.

5. A six-stage process be followed in negotiating treaties.

6. The treaty negotiation process be open to all First Nations in British Columbia.

7. The organization of First Nations for the negotiations is a decision to be made by each First Nation.

8. First Nations resolve issues related to overlapping traditional territories among themselves.

9. Federal and provincial governments start negotiations as soon as First Nations are ready.

10. Non-aboriginal interests be represented at the negotiating table by the federal and provincial governments.

Daniel Wiigaak, High Gitxsan Chief, circa 1923.
Canadian Museum of Civilization, 59502.

11 The First Nations, Canadian and British Columbian negotiating teams be sufficiently funded to meet the requirements of the negotiations.

12 The commission be responsible for allocating funds to the First Nations.

13 The parties develop ratification procedures that are confirmed in the Framework Agreement and in the Agreement in Principle.

14 The commission provides advice and assistance in dispute resolution as agreed by the parties.

15 The parties select skilled negotiators and provide them with a clear mandate, and training as required.

16 The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected that could undermine the process.

17 Canada, British Columbia and the First Nations jointly undertake public education and information programs.

18 The parties in each negotiation jointly undertake a public information program.

19 British Columbia, Canada and the First Nations request the First Nations Education Secretariat and various educational organizations in British Columbia to prepare resource materials for use in the schools and by the public.

Appendix II

As of December 31, 2001, the following First Nations were participants in the treaty process:

FIRST NATIONS IN STAGE 2:2

Council of Haida Nation
Hupacasath First Nation

FIRST NATIONS IN STAGE 3:4

Cheslatta Carrier Nation
Musqueam Nation
Quatsino First Nation
(member, Winalagalis Treaty Group)
Squamish Nation

FIRST NATIONS IN STAGE 4:42

Ditidaht First Nation, and Pacheedaht Band
Cariboo Tribal Council
Carrier Sekani Tribal Council
Esketemc First Nation
Gitanyow Hereditary Chiefs
Haisla Nation
Heiltsuk Nation
Homalco Indian Band
Kaska Nation
Katzie Indian Band
Klahoose Indian Band
Ktunaxa/Kinbasket Treaty Council
Laich-Kwil-Tach K'omoks Tlowitsis Council of Chiefs
Lake Babine Nation
Lheidli T'enneh Band
Nazko Indian Band
Northern Regional Negotiations
Carcross/Tagish First Nation
Champagne and Aishihik First Nation
Taku River Tlingit First Nation
Teslin Tlingit Council

Nuu-chah-nulth Tribal Council
Oweekeno Nation
Sliammon Indian Band
Snuneymuxw First Nation
Sto:Lo Nation
Te'Mexw Treaty Association
Tsawwassen First Nation
Tsay Keh Dene Band
Tsimshian Nation
Tsleil-Waututh Nation
Westbank First Nation
Wet'suwet'en Nation
Winalagalis Treaty Group
- Kwakiutl Nation
- Namgis Nation
- Da'naxda'xw Awaetlatla Nation
- Gwa'Sala-'Nakwaxda'xw Nation
- Tlatlasikwala Nation

Yale First Nation
Yekooche Nation

FIRST NATIONS IN STAGE 5:1

Sechelt Indian Band

THE BC TREATY PROCESS

Treaty negotiations pass through six stages.

Stage One: Statement of Intent

A First Nation wanting to initiate treaty negotiations must file a statement of intent with the Treaty Commission. The statement must:

- identify the First Nation and its members;
- describe the First Nation's traditional territory;
- indicate that the First Nation has a mandate to enter into and represent its members in treaty negotiations; and
- appoint a formal contact person.

Stage Two: Preparation for Negotiations

The three parties confirm their commitment to negotiate a treaty, establish that they have the authority and resources to commence negotiations, have a means of developing their mandates and broadly outline what each of them wishes to negotiate.

By the end of Stage Two, Canada and BC must also submit readiness documents to the Treaty Commission in which they identify community interests in the region and establish ways to address those interests. The table moves on to Stage Three when the Treaty Commission is satisfied that the parties have met these requirements.

Stage Three: Negotiation of a Framework Agreement

The Framework Agreement defines the issues the parties have agreed to negotiate, establishes the objectives of the negotiation, identifies the procedures that will be followed and sets out a timetable for negotiations. The parties expand their public consultation in local communities and initiate a program of public information.

Stage Four: Negotiation of an Agreement in Principle

Substantive treaty negotiations take place in this stage. Land, resources, self government and financial components usually form part of the negotiations. The Agreement in Principle sets out the key objectives and elements to be part of the treaty.

Stage Five: Negotiation to Finalize a Treaty

At this stage, outstanding legal and technical issues are resolved. Formal signing and ratification of the agreement brings the parties to Stage Six.

Stage Six: Treaty Implementation

The plans to implement the treaty are put into effect or phased in as agreed.